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# **SOMETIMES AN IMPACT FEE IS NOT JUST AN IMPACT FEE: THE POSSIBLE INEQUITABLE APPLICATION OF HAWAII'S IMPACT FEE STATUTE TO FOREIGN INVESTORS**

**Jose F. Vera**

*Abstract:* Historically, Hawaii has assessed foreign developers high impact fees either as a means to raise capital for affordable housing or as a means to regulate foreign investment. In 1992, Hawaii enacted House Bill 3787, an impact fee statute, to promote uniformity in Hawaii's assessments of impact fees. Although Hawaii's statute provides uniformity for most developers, it still permits local governments to assess foreign developers disproportionately higher impact fees. This Comment examines how a foreign developer might challenge either Hawaii's impact fee statute or an individual impact fee assessment as violating his or her constitutional rights under the Fourteenth Amendment's Equal Protection Clause. This Comment further argues that assessing foreign developers high impact fees either as a means to pay for affordable housing or as a means to regulate foreign investment is a bad policy choice in light of Hawaii's general need for investment.

## **I. INTRODUCTION**

In 1992, the Hawaii State Legislature enacted House Bill 3787, its first uniform impact fee statute.<sup>1</sup> Impact fee statutes require developers to pay a portion of the cost for those infrastructure improvements that are required to support a developer's new development.<sup>2</sup> Correspondingly, impact fee statutes limit local governments to using the money collected from these fees to offset the cost of only those infrastructure improvements required by the developer's new development. In this way, those who benefit from the improved services, the developers, pay a portion of the cost for infrastructure improvements, like new roads, power and sewer services.

Prior to the passage of House Bill 3787, Hawaii's local governments assessed impact fees in an ad hoc manner, occasionally assessing foreign nationals disproportionately high impact fees.<sup>3</sup> House Bill 3787 was in-

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<sup>1</sup> See *infra* notes 89-101 and accompanying text.

<sup>2</sup> See *infra* notes 61-88 and accompanying text.

<sup>3</sup> See *infra* notes 61-88 and accompanying text.

tended to standardize Hawaii's impact fee rates and to increase the certainty of development costs for developers.<sup>4</sup>

However, instead of standardizing impact fees for all developers, House Bill 3787 still permits local governments to assess foreign developers disproportionately high fees. Such assessments are problematic for two reasons. First, the State of Hawaii may be creating a disincentive for foreign investment by assessing foreign national developers higher impact fees, thereby diverting foreign investment away from Hawaii. Second, assessing higher fees against foreign developers on the basis of nationality may be unconstitutional. Hawaii's use of impact fees also illustrates an underlying tension faced by local governments. Namely, local governments must respond to the demands of its citizens. Yet at the same time, local governments must also attempt to accommodate global market forces that merge disparate cultures, and that financially sanction those governments that reduce the profitability for international investors. This Comment examines these legal and policy issues in three parts.

Part II discusses how impact fees affect development and why changes in Hawaii's investor profile will exacerbate the effect of high impact fees on international investment. This part addresses the specific problems created when local governments assess foreign national developers higher impact fees than national or local developers. Part II then discusses the factors motivating Hawaii's municipal and county governments to assess foreign nationals higher impact fees. Finally, it discusses how these assessments tend to affect foreign investment and why the change from predominately Japanese investors to Chinese investors in Hawaii exacerbates the effect of high impact fee assessments on international investment.

Part III examines the legal issues raised by inequitably assessing foreign nationals higher impact fees. For practical purposes, this section explores the ways an international investor may challenge an inequitable impact fee assessment. The section specifically focuses on two legal issues. First is whether a foreign national developer has constitutional standing when claiming that an impact fee statute or an individual impact fee assessment violates the developer's constitutional rights. Next, after con-

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<sup>4</sup> See JAMES C. NICHOLAS & DAN DAVIDSON, *IMPACT FEES IN HAWAII: IMPLEMENTING THE STATE LAW 1* (1992); see also Mari Taketa, *The Jaded Yen: After Years of Heated Courtship, Japanese Tourists and Investors Are Snubbing Hawaii*, *HAWAII BUSINESS*, June 1991, § 1, at 30, available in LEXIS, Nexis Library, ASAPII File.

cluding that all but non-resident property owning foreign nationals have constitutional standing to challenge an impact fee statute or an impact fee assessment, the second issue is whether assessing foreign national developers higher impact fees as a pre-condition to granting development permits violates the foreign national developer's equal protection rights.

Part IV discusses why Hawaii's local governments should not assess foreign national developers disproportionately high impact fees. It concludes by arguing that Hawaii should not misuse the statute's fee provisions to address problems other than equitably funding new infrastructure improvements. Likewise, Hawaii should not use collected fees to pay for Hawaii's affordable housing needs unless the assessed development creates a need for affordable housing, nor should Hawaii assess disproportionately high impact fees as a backhanded means of regulating foreign investment. Such impact fee assessments are constitutionally questionable and, because they tend to discourage foreign investment in Hawaii, they are unsound policy. Finally, part IV concludes by noting that the issues raised by Hawaii's impact fee statute represent the difficulties faced by local governments attempting to address needs of their citizens while simultaneously integrating with the new global economy.

## II. IMPACT FEES IN HAWAII

### A. *The Historical Development of Hawaii's Impact Fee Statute*

In 1990, a Japanese golf course developer agreed to pay an \$111 million impact fee for a recently completed golf course and further agreed to pay \$200 million in community impact fees for permission to build two more Oahu golf courses.<sup>5</sup> The local government's requirement of paying a \$100 million impact fee as a pre-condition to granting a golf course development permit reflects the ad hoc manner in which Hawaiian governments assessed impact fees prior to the enactment of House Bill 3787. Moreover, such impact fee assessments support the inference that suspect factors motivate Hawaii's impact fee assessments because before Japanese investors constituted the bulk of Hawaiian golf course development permit

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<sup>5</sup> *Hawaiian Officials Seek Slice of State's Golf Course Boom*, DETROIT FREE PRESS, Dec. 5, 1990, at 2G.

applicants, Hawaiian golf course impact fees were much lower than \$100 million; they ranged around several million dollars.<sup>6</sup>

To all developers, these potentially burdensome impact fee assessments, combined with restrictive land-use regulations, sent an implicit message that new development was not welcome in Hawaii.<sup>7</sup> The uncertainty associated with such burdensome impact fee assessments and restrictive land-use regulations created an untenable risk for developers.<sup>8</sup>

To resolve the uncertainty created by such land-use regulations, Hawaii's legislature enacted House Bill 3787.<sup>9</sup> The bill creates uniform impact fee rates for local developers by specifically detailing how impact fee rates are to be determined. However, the bill still allows Hawaii's local governments to assess foreign developers higher impact fees than those charged to local developers for similar types of developments. While there could be a rational basis for charging foreign national developers higher impact fees for some developments, this Comment focuses on inequitable impact fee assessments allowed by House Bill 3787 towards foreign developers. This problem is best exemplified by Hawaii's short lived \$100 million golf course impact fee.

#### *B. The Effect of High Impact Fee Assessments on International Investment*

Assessing foreign nationals higher impact fees will tend to discourage foreign investment. To Hawaii, the loss of foreign investment will impact the Hawaiian economy, as foreign investors now own over half of downtown Honolulu's office space, about sixty-six percent of the state's hotel rooms, and almost nine percent of the state's agricultural land.<sup>10</sup> These numbers indicate the significant role foreign investment plays in the Hawaiian economy. These numbers also implicitly suggest that a reduction in foreign investment will have a negative economic impact if Hawaii experiences a loss of investment capital in these sectors of its economy. Thus, in considering how impact fees affect development, it is important to

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<sup>6</sup> DAVID L. CALLIES, PRESERVING PARADISE 45 (1994).

<sup>7</sup> Taketa, *supra* note 4, at 30.

<sup>8</sup> *Id.*

<sup>9</sup> See NICHOLAS & DAVIDSON, *supra* note 4, at 1.

<sup>10</sup> James Mak & Marcia Y. Sakai, "Is foreign investment good or bad for Hawaii?", in THE PRICE OF PARADISE 34 (Randall Roth ed., 1992).

examine how assessing foreign nationals higher impact fees will affect foreign investment in Hawaii.

Foreign investment is likely to decrease if local Hawaiian governments are permitted to assess foreign national developers disproportionately high impact fees. To foreign investors large impact fees endanger their investment's profitability.<sup>11</sup> The threat posed by Hawaii's land-use controls and by the mere possibility of disproportionately high impact fees caused at least two longtime Japanese investors to move their new investments to cheaper, less threatening markets.<sup>12</sup> The commercial real estate firm Monroe & Friedlander reported through its president, Andy Friedlander, that its Japanese clients were turning their attention to the markets in Hong Kong, Europe, and the mainland United States.<sup>13</sup> Likewise, Walter Dods Jr., chairman and CEO of First Hawaiian Bank and Hawaii chairman of the Japan-Hawaii Economic Council, noted that "major Japanese corporations with investments in Hawaii were considering investing major dollars outside" of Hawaii where they might feel more welcome.<sup>14</sup> Thus, the question of how high impact fees affects foreign investment is answered by the investors themselves. High impact fees, which contribute to high development costs, discourages foreign investment and causes them to invest in other more profitable markets.

### C. *The Factors Behind the Assessment of Hawaii's Impact Fees*

Two major factors influenced the historical tendency of Hawaii's local governments to assess foreign nationals disproportionately high impact fees: (1) Hawaii's lack of affordable housing, and (2) Hawaii's concern with large scale foreign investment. The problem for foreign investors, however, is that there is no indication that these concerns have disappeared from the islands. If these factors are still present, they may motivate Hawaii's local governments to continue assessing foreign national developers disproportionately high impact fees.

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<sup>11</sup> Taketa, *supra* note 4, at 30.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Hawaii's lack of affordable housing has directly affected Hawaii's use of impact fees.<sup>15</sup> Hawaii, by its own count, "has the most severe homeless problem in the United States." Hawaii spends approximately \$15 per capita on the homeless as compared to the mainland which spends approximately \$4 per capita.<sup>16</sup> Hawaiian officials "estimate that 64,000 affordable homes need to be built by the year 2000."<sup>17</sup> To meet this goal, Hawaii required developers to buy or pay for new units.<sup>18</sup> Hawaii's acute housing shortage was one factor that led Governor John Waihee and Honolulu Mayor Frank Fasi to support a \$100 million impact fee for golf course development permits to raise money to pay for affordable housing.<sup>19</sup>

The public's fear of economic colonization served as an additional motivation for Mayor Fasi and Governor Waihee to propose a \$100 million impact fee on each new golf course.<sup>20</sup> Many Hawaiians blamed Japanese investment for the housing shortage and for the escalation of housing prices.<sup>21</sup> Hawaii's lack of affordable housing caused local residents to feel that their opportunity for home ownership was threatened by foreign investors and thereby generated political pressure to slow foreign investment.<sup>22</sup>

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<sup>15</sup> John Woestendiek, *Hawaii finally begins to tackle growing problem of homeless*, HOUSTON CHRON., Nov. 10, 1991, at A18, available in LEXIS, Nexis Library, HCHRN File; see also David Tong, *Trouble in Paradise: Home Prices Scaring Hawaiians Away*, WASH. POST, Aug. 19, 1990, at h02.

<sup>16</sup> The seriousness of Hawaii's housing problem is evident from the words spoken by Glenn Kaya, CEO of \$87 million Gem of Hawaii:

It's not just an issue of affordable homes, the homeless and the children who must move in with their parents[sic]. The banks must adjust their loan ratios. The state must create more Kakaakos where variance has become the rule and not the exception. The exodus of the competent young, the drain of the good work force to the mainland because they can buy a home for less than half the cost in Hawaii, are all facts and everyday occurrences.

Diane Chang, *Supply in Demand*, HAWAII BUSINESS, Jan. 1992, § 1, at 17, available in LEXIS, Nexis Library, ASAPII File.

<sup>17</sup> Tong, *supra* note 15, at h02.

<sup>18</sup> *Id.*

<sup>19</sup> See *Hawaiian Officials Seek Slice of State's Golf Course Boom*, *supra* note 5, at 2G (reporting the idea of charging golf course developers a "community impact fee" to pay for rental housing has drawn the support of Gov. John Waihee and Honolulu Mayor Frank Fasi); see also David L. Callies, "Why would anyone oppose the \$100 million golf-course development fee proposed by Mayor Fasi?", in *THE PRICE OF PARADISE* 169 (Randall Roth ed., 1994).

<sup>20</sup> Kirstin Downey, *Japanese Investors Turn Interest to Golf Course; 'Golf Friction' Stirs Fear Fees Will Become Prohibitive to Americans*, WASH. POST, June 2, 1991, at K1.

<sup>21</sup> Mak & Sakai, *supra* note 10, at 36.

<sup>22</sup> James Kindall, *The Japanese are going Hawaiian; A growing presence on the island*, NEWSDAY, Dec. 4, 1991, at 4 (As a result of foreign investment, in 1991, Hawaii's cost of living and housing prices were 35% higher than on the mainland. The high cost of living represents the so-called 'paradise tax.').; see also Tong, *supra* note 17, at h02 (stating that Honolulu Mayor Frank Fasi vehemently opposes foreign

Governor John Waihee confirmed the existence of political pressure when he commented, "Hawaii's residents are experiencing a sense of loss . . . of their land to others and, more importantly, loss of control."<sup>23</sup> Whether Hawaii continues to assess foreign developers high impact fees may, in large part, depend on whether the factors that motivated past high impact fees assessments are still present in Hawaii.

Nothing in Hawaii suggests that there is no longer a lack of affordable housing nor a diminished concern over wide scale foreign investment. Just as these factors motivated Hawaii's local governments to raise the specter of high impact fee assessments in the past, these factors may influence local governments to assess foreign developers high impact fees in the future. Although, as discussed in the next section, the threat of high impact fees was not the sole factor discouraging Japanese development, changes in Hawaii's foreign investor profile may exacerbate the result of high impact fees assessments on Hawaii's future foreign investors. The next section will discuss the change from predominately Japanese investment in Hawaii to a growing Chinese investment presence and the reasons the Chinese are likely to react differently than the Japanese to the imposition of disproportionately high impact fee assessments.<sup>24</sup>

#### D. *International Investment in Hawaii*

Japanese and Chinese investors constitute a large portion of Hawaii's international investment. Japanese investment in Hawaii reached its peak in the late 1980s and early 1990s. Chinese investment, however, is just beginning and probably will continue to grow into the next century.<sup>25</sup> Japanese and Chinese investors are distinguishable by their different motives for investing in Hawaii. Their distinct motives are revealed by examining the economic and social conditions that spawned these respective investors. The difference in the investors' motivations explains and helps predict how each group of investors either has or will respond to Hawaii's use of impact fees. All investors expect a return on their invest-

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purchases of island homes for speculative purposes and that the Mayor has criticized Japanese investors for "exacerbating" an already tight housing condition); Callies, *supra* note 19, at 169-70.

<sup>23</sup> Mak & Sakai, *supra* note 10, at 38.

<sup>24</sup> See, e.g., Mike Markrich, *The morning after: In the shaky aftermath of the revelry of Japanese buying, new players from the Far East are slowly transforming Hawaii's foreign investment scene*, HAWAII BUSINESS, June 1993, § 1, at 16, available in LEXIS, Nexis Library, ASAPII File.

<sup>25</sup> *Id.*



ments. Impact fees, by nature, diminish the return on a given investment. As such, the issue is how the expectation of diminished profits affects each investment group.

### 1. *Japanese Investment*

During the late 1980s and early 1990s, the desire for profits motivated the Japanese to invest in the United States real estate market.<sup>26</sup> The ability to make these investments resulted from an overvaluation of the Japanese real estate market.<sup>27</sup> The market's overvaluation created equity that individual investors, under pressure from their bankers, borrowed against, thereby generating excess capital.<sup>28</sup> The resultant cash-rich Japanese became the driving force behind Japanese investment in the United States.<sup>29</sup>

Several factors led the Japanese to believe that investing in the United States meant big profits. First, during the 1980s, the yen nearly doubled in value as compared to the dollar.<sup>30</sup> The strength of the yen made investment in the United States affordable. Second, Japanese interest rates were relatively low (about five to six percent) as compared to U.S. rates.<sup>31</sup> Believing they could earn more than a six percent return on their U.S. investments, the Japanese speculatively invested in the United States.<sup>32</sup>

A considerable percentage of the Japanese investment in the United States focused on Hawaii,<sup>33</sup> and a large portion of that investment was in

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<sup>26</sup> The Japanese have invested \$76 billion in the U.S. real estate market since the mid-1980s. *Japanese 1991 Investment in U.S. Real Estate Plummets to \$5 Billion, Leventhal Study Shows*, PR Newswire, Feb. 20, 1992, available in LEXIS, Nexis Library, ASAPII File; see also *Japanese Have Not Abandoned U.S. Real Estate, According to Study by Kenneth Leventhal & Co.*, PR Newswire, Nov. 14, 1990, available in LEXIS, Nexis Library, ASAPII File.

<sup>27</sup> During the late 1980s the value of Tokyo's real estate was 50% higher than its value in the fall of 1993. Robert F. Grondine, *Japan's Real Estate Market: Fall from Incredible Heights Forcing Much-Needed Changes*, E. Asian Executive Reports, Aug. 15, 1993, at 9, available in LEXIS, Nexis Library, EASIAN File.

<sup>28</sup> Conversation with Steve Dickinson, Esq., a partner in Seattle's Garvey, Schubert & Barer. He was personally involved in Japanese Banking business in the late 1980s.

<sup>29</sup> *Japanese Have Not Abandoned U.S. Real Estate, According to Study By Kenneth Leventhal & Co.*, *supra* note 26.

<sup>30</sup> Mak & Sakai, *supra* note 10, at 36.

<sup>31</sup> *Id.*

<sup>32</sup> Conversation with Steve Dickinson, Esq., *supra* note 28.

<sup>33</sup> Foreign investment in Hawaii now accounts for over half of the office space in downtown Honolulu, about two-thirds of Hawaii's hotel rooms, and about 9% of the agricultural property (national average for foreign owned agricultural property is 1.1%). In 1990, the Japanese accounted for 98% of all the foreign investment in Hawaii. Mak & Sakai, *supra* note 10, at 34.

golf courses.<sup>34</sup> Japanese investment in Hawaiian golf courses is understandable considering Japan's domestic golf market. The Japanese have a love affair with golf but a shortage of available land.<sup>35</sup> The shortage of land for Japanese golf courses caused 1991 Japanese golf course membership fees to range from \$900,000 to \$2.7 million.<sup>36</sup> Because the cost of golfing in Japan was too expensive for most golfers, Japanese investors created Hawaiian golfing vacation packages as a solution.<sup>37</sup> Japanese investors found it profitable to sell international memberships in their Hawaiian-built golf courses for around \$150,000.<sup>38</sup>

The economic conditions in Japan combined with the large potential profits from building Hawaiian golf courses rendered Hawaii's use of high impact fees an acceptable cost of doing business. These considerations made it possible for Hawaiian governments to charge Japanese developers higher impact fees. The Japanese did not challenge these impact fees, and at least one Japanese developer was willing to pay them.

## 2. *Chinese Investment*

Chinese investment in Hawaii differs significantly from the preceding Japanese investment.<sup>39</sup> While Chinese investment in Hawaii is substantial, ranging as high as \$550 million in 1992,<sup>40</sup> a few important factors distinguish Chinese investors from their Japanese counterparts. First, the domestic economic factors supporting Chinese investment are different than those that supported the Japanese. Second, the Chinese generally tend to use different social institutions than the Japanese when investing.

The expansion of mainland China's economy is creating wealth for Chinese entrepreneurs.<sup>41</sup> According to Zhang Yayun, manager of the Beijing Rongxin Co., most mainland Chinese investors are self-employed

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<sup>34</sup> Kirsten Downey, *supra* note 20.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> For purposes of this Comment, the term "Chinese investors" includes both mainland Chinese and Nanyang (overseas) Chinese. The latter term includes ethnic Chinese from the following countries: Korea, Thailand, Peninsular Malaysia, The Philippines, Indonesia, Vietnam, and Cambodia.

<sup>40</sup> Markrich, *supra* note 24, at 16.

<sup>41</sup> See HIROYUKI KATO, ECONOMIC REFORM AND INTERNATIONALIZATION: CHINA AND THE PACIFIC REGION 118-20 (1992) (including Table 8.2 at page 120 showing that per capita income grew most strongly in Zhejiang (up 52.5%), Guangdong (up 42.2%), Fujian (up 27.4%), Jiangsu (up 25.8%), and Shandong provinces (up 18.1%)).

businessmen from Beijing, Tianjin, and the provinces of Sichuan and Fujian and the Guangxi Zhuang Autonomous region.<sup>42</sup> When investing in real estate, the Chinese often use cash from savings to pay for their purchases.<sup>43</sup> The Chinese prefer to use cash because many Chinese are wary of their government's policies on foreign currency conversion, so they seek to invest their dollar, yen, or deutschmark profits in havens outside the reach of their government.<sup>44</sup> The Chinese also differ from other investors in that they rely on wise investments instead of social security or pensions for their retirement security, so the price and long-term security of their potential investments are important considerations.<sup>45</sup>

In addition to the purely economic differences between Japanese and Chinese investors, cultural differences indicate that the Chinese will react differently to Hawaii's impact fees. Unlike Japanese investment in Hawaii that was facilitated by lending institutions, Chinese investment is facilitated by the Chinese business family. Understanding the Chinese business family is central to understanding the overseas Chinese business culture.<sup>46</sup> The Chinese business family is composed of the immediate family and kinship relationships, including a broadly defined extended family.<sup>47</sup> The primary benefit derived by the Chinese from the business family is an increased ability to manage money<sup>48</sup> and to make their money work for them.<sup>49</sup> Chinese business families have the capacity to move their money through an extensive network of Pacific Rim Chinese banks.<sup>50</sup>

When investing in real estate, the Chinese use their business family connections to insure the profitability of their potential investments. They call on trusted family, friends, and business associates, including local lawyers and accountants who reside in the targeted city, to evaluate the potential investment.<sup>51</sup> An important factor considered by the Chinese when investing in a city is the possibility of encountering discrimination or,

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<sup>42</sup> See Liu Weiling, *China: Florida Plots Selling Well*, BUS. WEEK, Sept. 5, 1993, available in LEXIS, Nexis Library, BUSWK File (China Daily supplement).

<sup>43</sup> Markrich, *supra* note 24, at 16.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (according to Henry Yu, vice president of the Bank of Hawaii's China Marketing Group).

<sup>46</sup> MICHAEL GOLDBERG, *THE CHINESE CONNECTION: GETTING PLUGGED IN TO PACIFIC RIM REAL ESTATE, TRADE AND CAPITAL MARKETS* 20 (1985) (citing MAURICE FREEDMAN, *THE STUDY OF CHINESE SOCIETY* 243 (1979)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 19.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 49.

in the extreme, physical violence.<sup>52</sup> This fear of discrimination causes the Chinese to place a premium on hospitable, stable investment opportunities.<sup>53</sup> Their ability to find these opportunities is made possible by their complex web of family, friends, and business linkages.<sup>54</sup>

### 3. *The Difference between Japanese and Chinese Investors*

Large impact fee assessments will be a greater deterrence on Chinese investment than they were on Japanese investment. The principle difference between Chinese investors and Japanese investors is that unlike the Japanese whose investment capital was derived from collateralized loans, Chinese investment capital is derived from cash reserves generated by China's expanding economy.<sup>55</sup> To the Japanese the impact fees represented an acceptable business cost. However, to the Chinese, high impact fees may negatively affect their Hawaiian investment because they, unlike the Japanese, tend to invest using cash reserves. Furthermore, Chinese investments tend to be long-term in nature rather than short-term speculation.

Beyond purely economic factors, the investors' motives for investing also distinguish them. The Japanese invested in Hawaii to create a market for Japanese vacationing golfers, whereas the Chinese are generally investing in Hawaii to place their wealth outside the reach of the mainland government or outside the reach of possible discrimination or confiscation. So, while the Japanese were willing to accept higher costs to realize big profits, the Chinese who are not investing solely for big profits, may be less willing to accept additional costs. If Hawaii uses its impact fee statute to force the Chinese to subsidize Hawaii's affordable housing program, then the Chinese will likely invest their capital in other markets.

Additionally, the emerging global economy may exacerbate the Chinese reaction to high impact fee assessments. The emerging global economy is increasing the ability of financial decision makers to react to decreased investment returns. The transactions that define the global economy — money and information on the one hand, and trade and investment on the other — are merging into one transaction.<sup>56</sup> Investors who use current telecommunications networks, computer networks, and multimedia

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<sup>52</sup> *Id.* at 30.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Markrich, *supra* note 24, at 16.

<sup>56</sup> Peter F. Drucker, *Trade lessons from the World Economy*, FOREIGN AFF., Jan.-Feb. 1994, at 99.

capabilities now have access to large amounts of information. This flow of information is transforming the standard notions of international economics<sup>57</sup> by diminishing the effect of distances and national borders on international trade.<sup>58</sup> In this climate of international trade, the distinction between domestic and international policy become less meaningful as domestic decisions that reduce the profitability of international investment cause investors to seek other more profitable markets.<sup>59</sup> Consequently, these emerging economic trends, combined with the Chinese business family's ability to move capital around the Pacific Rim, will exacerbate any negative Chinese reaction to high impact fee assessments.

Thus, the Chinese business family exaggerates the effect that increased information has on international investors. The Chinese business family not only enhances a Chinese investor's ability to gather information but it also enhances the investor's ability to financially react to that information.<sup>60</sup> In the case of Hawaii, the information that high impact fees are reducing the profitability of real estate investment will likely cause the Chinese to move their real estate investment elsewhere.

### III. LEGAL ISSUES RAISED BY INEQUITABLE ASSESSMENTS OF IMPACT FEES

Part III first discusses impact fees and the issues that arise in their application. Section A addresses impact fees, both in general and specifically in Hawaii. Section B addresses whether foreign nationals have standing under either the U.S. Constitution or under Hawaii's Constitution to challenge an impact fee statute. Lastly, section C addresses whether foreign nationals, asserting a violation of their equal protection rights, could successfully challenge Hawaii's impact fee statute or an individual impact fee assessment as violative of their constitutional rights. However, section C will not address a foreign national's potential takings, taxing, or due process claims. Rather, section C will only address a foreign national's potential equal protection claim. The discussion in section C excludes a foreign national's potential takings, taxing, and due process claims because such claims would be identical to those of a U.S. national and therefore, a discussion of these claims would add little to existing scholarship.

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<sup>57</sup> See, e.g., *id.* (with increased information about potential investment opportunities, influential decision makers can quickly allocate resources around the world for the best return on their investment).

<sup>58</sup> Kenichi Ohmae, *Rise of the Region State*, FOREIGN AFF., Spring 1993, at 78.

<sup>59</sup> Drucker, *supra* note 56, at 104.

<sup>60</sup> GOLDBERG, *supra* note 46, at 19.

However, before discussing a foreign national's potential claims, a review of impact fees is useful.

### A. *Impact Fees*

In the United States, reduced federal funding and voter opposition to increases in the ad valorem property tax are undermining state and local government's ability to provide basic infrastructure services.<sup>61</sup> Consequently, state and local governments are finding it necessary to shift a portion of the infrastructure costs to real estate developers.<sup>62</sup> To alleviate the financial burden of building the necessary infrastructure to support new development, local governments charge developers a proportionate share of the cost for infrastructure improvements needed to support the developer's new development.<sup>63</sup> Depending on the type of infrastructure improvements necessitated by the new development, local governments exact compensation from private developers in a variety of methods. Local governments may require a developer to offset the community's cost for infrastructure improvements by either dedicating land or by paying various fees.

In Hawaii's case, the local government requires developers to offset the community's development costs by paying impact fees. Local governments assess impact fees when a new development directly affects the community's infrastructure and thereby requires the local government to make infrastructure improvements.<sup>64</sup> In this case, the local government will generally assess an impact fee to pay a proportionate share of the improvement's cost to offset the new development's financial impact on the community.<sup>65</sup>

#### 1. *General Limitations on the Use of Impact Fees*

While state and local governments are generally free to charge impact fees, the use of impact fees is limited by the doctrine of unconstitutional conditions. The doctrine of unconstitutional conditions provides a general limitation on the use of impact fees. Under the doctrine of unconstitutional conditions, the government may not condition the discretionary granting of

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<sup>61</sup> CALLIES, *supra* note 6, at 37.

<sup>62</sup> *Id.*

<sup>63</sup> NICHOLAS & DAVIDSON, *supra* note 4, at 2.

<sup>64</sup> DANIEL R. MANDELKER, *LAND USE LAW* 380 (2d ed. 1988).

<sup>65</sup> NICHOLAS & DAVIDSON, *supra* note 4, at 1; *see also* MANDELKER, *supra* note 64, at 380.

a government benefit upon an applicant's relinquishment of a constitutional right.<sup>66</sup> For example, the government may not require a developer to relinquish a right to compensation in exchange for a development permit. Although the common law has not applied the doctrine of unconstitutional conditions to impact fees, impact fees generally are considered to fall within the doctrine's scope.<sup>67</sup> Therefore, in determining whether an impact fee statute or an impact fee assessment is valid, the initial step is to determine whether the statute or the assessment meets the doctrine's requirements.

In the context of impact fees, the doctrine of unconstitutional conditions is defined by the essential nexus test as developed in *Nollan v. California Coastal Commission*,<sup>68</sup> and in *Dolan v. City of Tigard*.<sup>69</sup> The essential nexus test is composed of two parts. To satisfy the test's first part a rational nexus must exist between the government's objective in imposing the fee and the fee's burden on the developer.<sup>70</sup> After finding a rational nexus, the test's second part is satisfied when it is determined whether the fee imposed upon the developer is sufficiently related to the development's impact on the community.<sup>71</sup> This two part test determines whether a particular impact fee violates the doctrine of unconstitutional conditions by establishing whether an essential nexus exists between the government's objective in imposing an impact fee and the fee's burden on the developer.

The rational nexus test was developed in *Nollan v. California Coastal Commission*.<sup>72</sup> The Nollans owned a beach front lot in Ventura County, California. The Nollans attempted to rebuild the house on the lot and therefore applied to the California Coastal Commission, the state agency charged with coastline development, for the necessary permit. The Commission granted the Nollans a permit subject to the Nollans granting a public easement across their lot. The easement requested by the Commission was bounded on one side by the ocean and on the other by a seawall. The Commission maintained that such a lateral easement was necessary because the Nollans' proposed new house would interfere with the public's visual access to the beach by creating a psychological barrier between the inland public and the ocean, and that the easement was necessary to alleviate the

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<sup>66</sup> CALLIES, *supra* note 6, at 39; *see also* *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994).

<sup>67</sup> CALLIES, *supra* note 6, at 39.

<sup>68</sup> 483 U.S. 825 (1987).

<sup>69</sup> 114 S. Ct. 2309 (1994).

<sup>70</sup> 483 U.S. at 837.

<sup>71</sup> *Id.* at 838.

<sup>72</sup> 483 U.S. 825 (1987).

burden imposed by the psychological barrier created by the Nollans' new house.

The *Nollan* Court held that the Commission's requirement of a public easement constituted a taking of property because the mandatory dedication of a beach front easement running parallel to the waterline did not advance the legitimate state objective of lowering the psychological barrier created by the Nollans' new house.<sup>73</sup> In short, there was no "essential nexus" between the mandatory dedication of the easement and the purported state objective of allowing the public to view the ocean across the Nollans' land.<sup>74</sup> Thus, the rational nexus test requires the local government's objective in imposing an impact fee to be rationally related to the condition imposed on the developer.

After establishing a rational nexus, a court must then determine whether the imposed condition is sufficiently related in nature and extent to the proposed development's impact on the community.<sup>75</sup> This test was set forth in *Dolan v. City of Tigard*.<sup>76</sup> In *Dolan*, the Tigard City Planning Commission conditioned approval of Dolan's plan to expand her plumbing and electrical supply store upon two preconditions. First, she had to dedicate to the City a portion of her property lying within the 100-year flood plain to be used for improvements to the storm drainage system along Fanno Creek. Second, she had to dedicate an additional 15-foot strip of land running parallel to the flood plain as a pedestrian/bicycle pathway.<sup>77</sup>

In first considering whether a rational nexus existed between the government's legitimate interest and the permit condition exacted by the city, the *Dolan* Court found that the city's request satisfied the test. Specifically, the *Dolan* Court found that an easement dedication for flood control purposes along Fanno Creek and for a pedestrian/bicycle pathway to relieve traffic congestion in the city's central business district qualified as legitimate government interests.<sup>78</sup> Having satisfied the rational nexus test, the Court then considered the second prong of the unconstitutional conditions test; whether the degree of exactions bore the required relationship to the development's projected impact on the local community.

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<sup>73</sup> *Id.* at 838-842.

<sup>74</sup> NICHOLAS & DAVIDSON, *supra* note 4, at 5.

<sup>75</sup> See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2313.

<sup>78</sup> *Id.* at 2314.



The *Dolan* Court found that the exactions demanded by the city exceeded the required relationship between the condition imposed on the developer and the development's impact on the community. Examining the issue, the Court stated that the relationship between the imposed condition and the development's impact must meet a "rough proportionality" test.<sup>79</sup> The Court said the test required no precise mathematical calculation, but stated "the city must make some sort of individualized determination that the required dedication is related both in nature and extent" to the proposed development's impact.<sup>80</sup>

Applying this requirement, the Court found that the exactions failed to comport with the newly articulated standard. First, the Court stated that the city failed to make an individualized determination of why a public greenway along Fanno Creek was necessary as opposed to a private greenway, which would preserve the Dolans' property rights while simultaneously providing enhanced flood control.<sup>81</sup> Second, the Court stated that the city failed to meet the "rough proportionality" test in its demand for an exaction for the pedestrian/bicycle path because the city failed to make quantified findings to support its conclusion that a pedestrian/bicycle path easement, "could offset some of the traffic demand and lessen the increase in traffic congestion," created by the expanded store.<sup>82</sup>

As a result of *Dolan*, local and state governments must demonstrate by an individualized determination that the conditions they impose on developers are roughly proportional to the new development's projected impact on the community. In the context of impact fees, local governments could be required to demonstrate that the funds derived from impact fees will be applied to infrastructure improvements designed to alleviate the new development's impact on the community.

In addition to the essential nexus test, some states also require that the money assessed from developers be spent on improvements to benefit both the general public and the burdened development.<sup>83</sup> Under this requirement, an impact fee that provides no substantial benefit to the burdened development is invalid.<sup>84</sup>

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<sup>79</sup> *Id.* at 2319.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2320.

<sup>82</sup> *Id.* at 2321-2.

<sup>83</sup> *See, e.g., City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984).

<sup>84</sup> *Id.*

The broad purpose of these limitations on impact fees is to ensure that local governments do not shift the entire cost of expanding the existing local infrastructure to new developers.<sup>85</sup> However, when new developments require additional infrastructure or facilities, fairness requires that developers offset some of these costs because by not paying, the developer would force the local residents to bear the full cost of the required infrastructure improvements.<sup>86</sup>

## 2. *Hawaiian Impact Fees*

Hawaii adopted uniform impact fees when the legislature passed House Bill 3787.<sup>87</sup> Chapter 46, section 143, establishes the authority and procedures that local governments must follow when assessing impact fees on new private development.<sup>88</sup> Given that a foreign investor needs to know the potential costs associated with any planned real estate investment or development project, this section examines the portion of Hawaii's impact fee statute that could potentially be used to assess foreign nationals higher impact fees.

### a. *Elements of Hawaii's impact fee statute*

The Hawaii legislature drafted House Bill 3787 to address three issues. First, local governments must determine what necessary infrastructure improvements are attributable to new development so the local government can maintain an optimum level of services.<sup>89</sup> Second, local governments must determine what portion of the infrastructure improvement costs are attributable to new development and what portion are

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<sup>85</sup> See NICHOLAS & DAVIDSON, *supra* note 4, at 1.

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 1.

<sup>88</sup> See Appendix A.

<sup>89</sup> This question is addressed in subsection (a), which calls for qualified professionals to prepare a needs-assessment study to help the county: (1) determine standard service levels, (2) determine the facilities needed to maintain the predetermined service levels, (3) determine the types of infrastructure improvements for which fees shall be imposed, and (4) differentiate between facilities needed to overcome pre-existing infrastructure deficiencies and facilities needed to accommodate future needs attributable to new development. In an effort to safeguard the integrity of the needs assessment study, subsection (b) mandates that the gathered data and conclusions be set forth in a study. NICHOLAS & DAVIDSON, *supra* note 4, at 12; see also Appendix A (for text of subsection (a)).

attributable to pre-existing deficiencies in infrastructure.<sup>90</sup> Third, after determining the costs for infrastructure improvements attributable to new development, local governments must determine what portion of those costs they can pass on to private developers.<sup>91</sup> The third issue is the most significant of the three because it most directly relates to determining the impact fee amount to assess developers.

To address the third issue, the statute incorporates seven factors to ensure that local governments only charge developers a proportionate share of the cost for new infrastructure. The statute also limits local government's power to assess impact fees by incorporating the doctrine of unconstitutional conditions.

*i. Seven factors limit the amount of infrastructure improvement costs that local governments can shift to developers*

Section 143(d) specifically addresses the question of what portion of the costs for infrastructure improvements local government can shift to developers. Subsection (d) requires local governments to ensure that impact fees are substantially related to the new private development and that the fees represent a proportionate share of the costs incurred by local government in building the new infrastructure.<sup>92</sup> To ensure compliance with its requirements, subsection (d) also establishes procedures which guide local governments to ensure that impact fees are proportional and related to the total costs borne by local government in supporting new development.<sup>93</sup>

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<sup>90</sup> The second issue is addressed by subsection (c), which addresses how a local government determines the cost attributable to each new development. Subsection (c) calls for local governments to base the impact fee on that portion of the costs incurred by local government in improving the infrastructure attributable to new development. Additionally, local governments can only assess impact fees so as to offset the actual or estimated actual costs incurred by the county. Essentially, a county, in determining the amount of its impact fees, cannot consider the portion of the costs covered by either public funds provided by other levels of government or by private sources. NICHOLAS & DAVIDSON, *supra* note 4, at 12.

<sup>91</sup> *Id.*

<sup>92</sup> "An impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred by the county in accommodating the development." HAW. REV. STAT. § 46-143(d) (1993).

<sup>93</sup> The following seven factors are considered in determining a proportionate share of public facility capital improvement costs:

(1) The level of public facility capital improvements required to appropriately serve a development, based on a needs assessment study that identifies:

(A) Deficiencies in existing public facilities;

(B) The means, other than impact fees, by which existing deficiencies will be eliminated within a reasonable period of time; and

As policy, the seven factors are an attempt to equally distribute the cost of building new infrastructure between the developers and the existing residents. Although some commentators feel that the seven factors equitably distribute the burdens associated with infrastructure improvements,<sup>94</sup> a closer reading of the seven factors suggests that they favor the multi-project developer over the single-project developer. Subsection (d) favors the multi-project developer because it permits the local government to discount an impact fee assessment if the developer made past contributions for infrastructure improvements,<sup>95</sup> and also if the developer is likely to make future contributions for infrastructure improvements within the next twenty years.<sup>96</sup> Consequently, a multi-project developer or even a potential multi-project developer can probably obtain lower impact fee assessments than the single-project developer who will most likely not be able to qualify for a reduced impact fee assessment under subsection (d).

By permitting local governments to consider subsection (d)'s factors, they can justify assessing a foreign developer higher impact fees than local developers. Local governments could justify higher impact fees either on the grounds that the foreign developer has not contributed to infrastructure improvements in the last five years, or on the grounds that the foreign

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(C) Additional demands anticipated to be placed on specified public facilities by a development;

(2) The availability of other funding for public facility capital improvements, including, but not limited to, user charges, taxes, bonds, intergovernmental transfers, and special taxation or assessments;

(3) The cost of existing public facility capital improvements;

(4) The methods by which existing public facility capital improvements were financed;

(5) The extent to which a developer required to pay impact fees has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit therefrom, and any credits that may be due to a development because of such contributions;

(6) The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments; and

(7) The extent to which a developer is required to pay impact fees as a condition precedent to the development of non-site related public facility capital improvements, and any offsets payable to a developer because of this provision.

HAW. REV. STAT. § 46-143(d)(1)-(7) (1993).

<sup>94</sup> NICHOLAS & DAVIDSON, *supra* note 4, at 14.

<sup>95</sup> HAW. REV. STAT. § 46-143(d)(5) (1993).

<sup>96</sup> *Id.* § 46-143(d)(6); see also *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981) (discounting for future contributions to the county's capital improvements the county will avoid "double taxation" of the developer when assessing impact fees).

developer cannot reasonably anticipate to contribute to infrastructure improvements in the next twenty years.

A new domestic developer could avoid being assessed the same impact fee assessment as a new foreign developer because the new domestic developer, unlike his foreign counterpart, can argue for lower impact fees by asserting that he either is a long-time Hawaiian resident or is more likely to be a future long-time Hawaiian resident, and thereby can reasonably be anticipated to contribute to future infrastructure improvements. Additionally, United States mainland developers can argue for lower impact fee assessments by asserting that they, in contrast to their foreign counterparts, are more likely to have a continuing presence on the islands because they are insulated from fluctuations in the world's currency markets and from unpredictable foreign government policies on capital export.

ii. *Hawaii's impact fee statute and the doctrine of unconstitutional conditions*

Hawaii's impact fee statute incorporates the requirements set forth by the unconstitutional conditions doctrine.<sup>97</sup> To ensure that impact fees will alleviate the impact of a particular development, section 144 provides: (1) that the collected fees shall be deposited in a development trust fund; (2) that the county shall geographically define a benefit zone around the development in which the fees shall be spent; (3) that a needs-assessment study shall be conducted before the impact fees are collected from the developer; (4) that the county shall only spend the fees on the type of facilities for which they were collected; and finally (5) that the county shall either spend or commit the collected fees within six years of collection.<sup>98</sup> Additionally, as specified in section 145, if the county does not spend the collected fees within six years, then the county is obligated to refund the impact fee to the developer.<sup>99</sup>

Although section 144 and 145 might appear to provide the foreign national with adequate protection against disproportionately high impact

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<sup>97</sup> Actually, this is the second element in the essential nexus test. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

<sup>98</sup> HAW. REV. STAT. § 46-144 (1993).

<sup>99</sup> "If impact fees are not expended or encumbered within the period established in section 46-144, the county shall refund to the developer or the developer's successor in title the amount of fees paid and any accrued interest. Application for a refund shall be submitted to the county within one year of the date on which the right to claim arises. Any unclaimed refund shall be retained in the special trust fund or interest bearing account and expended as provided in section 46-144." HAW. REV. STAT. § 46-145 (1993).

fees, in reality, the protection may be illusory. The primary problem with section 144 is that the protection provided by the section, or lack thereof, largely depends on how the local government defines the section's terms. For instance, the protections provided by section 144 will largely depend on how the local government defines the objectives of the needs-assessment study, and on how it defines the "benefit zone." As a result of the limitations of section 144, the statute should be scrutinized in a realistic factual setting, rather than in the abstract. Moreover, a review of the statute may indicate how the statute's application would affect foreign developers. In accounting for Hawaii's political and social reality, the review should consider whether the statute may inadequately protect foreign developers from abusive impact fee assessments. If so, the review should also consider whether a foreign national can challenge either the statute or an individual impact fee assessment.

There are two legal issues raised when foreign nationals challenge impact fee statutes on constitutional grounds. The first issue is whether a foreign national has constitutional standing to challenge an impact fee statute or an individual impact fee assessment. The second issue, provided that the foreign national has constitutional standing, is whether a foreign national may challenge the statute or an individual impact fee assessment on the grounds that the statute violates his or her equal protection rights.

### *B. Foreign National Standing to Challenge an Impact Fee Statute*

A foreign national developer cannot invoke constitutional protections in challenging Hawaii's impact fees unless he has constitutional standing. There are three elements to constitutional standing. First, the foreign national must present a "case" or "controversy."<sup>100</sup> Second, he or she must sustain an "injury in fact."<sup>101</sup> The third element is the difficult one, and is the concern of this section. The constitutional amendment upon which the foreign national is challenging the government's action, must confer standing to foreign nationals. In the context of impact fees, the question of foreign national standing is resolved by analyzing whether the constitutional

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<sup>100</sup> William W. Dreyfoos, Note, *Constitutional Law-Standing to Sue Exclusionary Zoning Litigation: Catch-22 Revisited*, 54 N.C. L. REV. 449, 454 (1976) (citing *Warth v. Seldin*, 95 S. Ct. 2197 (1975)).

<sup>101</sup> *Id.*

amendment upon which the foreign national is basing his or her challenge against the impact fee statute grants standing to foreign nationals.

*1. Foreign National Constitutional Standing*

A foreign national will probably have standing to challenge Hawaii's impact fee statute. The Federal Constitution divides the nation's police power and, therefore, the power to regulate land, between the federal and state governments. Thus, to challenge a land-use regulation, a foreign national must determine whether he or she is challenging a state or federal regulation. The federal government's power to regulate land-uses is limited by the Fifth Amendment's Takings Clause and by the Fourteenth Amendment's Equal Protection and Due Process clauses.<sup>102</sup> Hawaii's power to regulate land-use is limited by the Fourteenth Amendment, which provides, "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," and by Hawaii's Constitution that limits the state's eminent domain power by providing, "Private property shall not be taken or damaged for public use without just compensation."<sup>103</sup> Under these considerations, to challenge the federal government's power to regulate land-uses the foreign national must be entitled to standing under either the Fifth or Fourteenth Amendments. To challenge Hawaii's power to regulate land-uses or Hawaii's eminent domain power, the foreign national must be entitled to standing under the Fourteenth Amendment or under Hawaii's Constitution. Because Hawaii's impact fee statute is neither an exercise of the federal government's power to regulate land-uses nor an exercise of Hawaii's eminent domain power, to challenge Hawaii's impact fee statute, a foreign national must have standing under either the Fourteenth Amendment's Equal Protection Clause or Due Process Clause.

*a. Fourteenth Amendment standing*

A foreign national has standing to challenge the state's power to regulate land-uses under both the Fourteenth Amendment's Due Process Clause and Equal Protection Clause when the foreign national is considered

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<sup>102</sup> "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

<sup>103</sup> U.S. CONST. amend. IV; see also HAW. CONST. art. I, § 20.

a "person within the jurisdiction" of the state.<sup>104</sup> The Fourteenth Amendment provides that a foreign national is a "person within the jurisdiction" when the foreign national is physically present in the jurisdiction.<sup>105</sup> Under this rule any foreign national who is in Hawaii either as a resident, a visitor, or a landowner can challenge an exercise of the Hawaiian government's police power by alleging either a violation of his or her due process or equal protection rights. When either the federal or state government exercises power outside the immigration context, Constitutional guarantees protect resident foreign nationals and citizens alike.<sup>106</sup> However, despite the fact that foreign nationals within the jurisdiction have standing to challenge a government's power to regulate land-uses, it is unclear whether foreign nationals outside the jurisdiction are accorded the same protection.

*i. Fourteenth Amendment standing for non-resident foreign nationals*

No court has indicated in unequivocal terms whether a state is required to give Fourteenth Amendment due process protections to a non-resident property-owning foreign national.<sup>107</sup> However, despite the lack of definitive holdings, Senior District Judge Van Pelt discussed the issue in his dissent in *Shames v. Nebraska*.<sup>108</sup> In *Shames*, a deceased resident foreign national devised his estate to four non-resident foreign national heirs. Under Nebraska statutes, non-resident foreign nationals were prevented from acquiring a fee simple absolute title to land. Therefore the heirs were denied their inheritance and the property escheated to the state. In response,

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<sup>104</sup> See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the provision, "Nor shall any State deprive any person of life, liberty, or property without due process of law" is universal in its application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality); see also *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988) (stating that aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments).

<sup>105</sup> See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988) (stating that Fourteenth Amendment protections extend to aliens without distinguishing between those who are [in the U.S.] legally or illegally, or between residents and visitors).

<sup>106</sup> Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 4 WIS. L. REV. 965, 989 (1993) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 nn.9-10 (1952)).

<sup>107</sup> See, e.g., *Shames v. Nebraska*, 323 F. Supp. 1321, 1333 (5th Cir. 1971). It should be noted that a non-resident foreign national can easily avoid this problem by incorporating an investment company in Hawaii, thus qualifying for resident status. Additionally, it should be noted that even though this section and *Shames* refer to non-resident "property-owning" foreign nationals, there is no material distinction between the non-resident "property-owning" foreign national in *Shames* and the non-resident foreign national that is the subject of this Comment.

<sup>108</sup> 323 F. Supp. 1321 (5th Cir. 1971).



the heirs filed a suit charging, *inter alia*, that they were deprived of their property in violation of the Fourteenth Amendment's Due Process Clause.<sup>109</sup> The majority never reached the question of whether the statute depriving a non-resident foreign national of his property violated the Fourteenth Amendment. Instead, the court held that under Nebraska statutes, the heirs never owned property in the first place. Therefore, because the heirs could not be deprived of property they never owned, the state's absolute bar of ownership of land by non-resident aliens did not violate their due process protections under the Fourteenth Amendment.<sup>110</sup>

However, in his dissent, Senior District Judge Van Pelt squarely addressed the issue of whether the Fourteenth Amendment's Due Process Clause grants standing to a non-resident foreign national. He stated that the Nebraska statute violated the heirs' due process rights under the Fourteenth Amendment.<sup>111</sup> In distinguishing the fact that the Equal Protection Clause protects only those persons within the state's jurisdiction, Judge Van Pelt noted the Due Process Clause contains no comparable words of limitation;

As I read the due process clause[sic], it applies to any person, regardless of whether that person resides within the territorial jurisdiction of the United States, if that person can show some deprivation of life, liberty, or property within the territorial jurisdiction sufficient to give the judiciary power to act. No words of qualification or limitation appear. I submit that, for purposes of standing, there is no logical basis for asserting that the words do not mean precisely what they say, and therefore a non-resident, friendly alien alleging a deprivation of his property which is located within the territorial boundaries of this country would have standing to raise the due process argument.<sup>112</sup>

Additionally, Judge Van Pelt argued that this country's economic position is due in part to European investors who placed their funds at risk in this country's development, because they rightly believed they were protected by constitutional guarantees.<sup>113</sup>

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<sup>109</sup> *Id.* at 1333.

<sup>110</sup> *Id.* at 1335.

<sup>111</sup> *Id.* at 1337-8.

<sup>112</sup> *Id.* at 1338.

<sup>113</sup> *Id.* at 1339.

Three years after the federal district court's ruling, the case came before the Nebraska Supreme Court. Although the Nebraska Supreme Court's opinion did not directly support Judge Van Pelt's dissent, it was arguably influenced by it as the court reached the same result as Judge Van Pelt but on different grounds. The Nebraska Supreme Court held that it was unnecessary to reach the Fourteenth Amendment's due process question, because the statutorily proscribed method by which non-resident aliens may be deprived of their inheritance was mistakenly read so as to preclude non-resident aliens from just compensation.<sup>114</sup> The court concluded that because the statute provides compensation to the non-resident aliens, it satisfies the demands of due process under any interpretation.<sup>115</sup>

*b. Equal protection standing*

A foreign national has standing under the Equal Protection Clause so long as the foreign national is considered a person within the jurisdiction. Under the Fourteenth Amendment, a foreign national is a "person within the jurisdiction" when the foreign national is physically present in the jurisdiction.<sup>116</sup> Under this standard, any foreign national who is in Hawaii either as a resident, a landowner, or even a visitor, has standing under the Fourteenth Amendment's Equal Protection Clause.

A company incorporated in Hawaii is also protected by the Fourteenth Amendment's Equal Protection Clause.<sup>117</sup> The U.S. Supreme Court held that corporations doing business within a state are "persons within the jurisdiction" and are protected by the Fourteenth Amendment's Equal Protection Clause.<sup>118</sup>

To summarize the issue of foreign national standing, the resident foreign national developer has standing to challenge the state's power to regulate land-uses under both the Fourteenth Amendment's Due Process Clause and Equal Protection Clause. However, if the foreign national is not a resident of Hawaii and therefore is considered to be outside the jurisdiction, then the non-resident foreign national probably has standing to challenge an impact fee statute under the Fourteenth Amendment's Due Process Clause but not under the Equal Protection Clause. If a developer

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<sup>114</sup> *Shames v. Nebraska*, 223 N.W.2d 481, 483 (Neb. 1974).

<sup>115</sup> *Id.*

<sup>116</sup> *See United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988).

<sup>117</sup> *See, e.g., Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921).

<sup>118</sup> *Id.*

has standing he or she may therefore be able to successfully challenge Hawaii's impact fee statute on the basis that the statute violates the developer's equal protection rights.

## 2. *Constitutionality of Hawaii's Impact Fee Statute*

An impact fee statute can be unconstitutional either on its face as drafted, or as applied in a given situation. This section first discusses whether Hawaii's impact fee statute comports with constitutional requirements as drafted. Then it examines whether statutorily authorized impact fee assessments similar in nature to the proposed \$100 million golf course impact fee are constitutionally valid when such assessments disproportionately impact foreign nationals. In discussing individual impact fee assessments, this section assumes that the historical factors that influenced Hawaii's past use of impact fees will be present and influencing Hawaii's future use of impact fees. Thus, the \$100 million golf course impact fee and the factors behind the assessment may help to predict whether such disproportionately high impact fee assessments will occur in the future and whether such assessments are susceptible to a constitutional challenge.

### a. *Constitutionality of Hawaii's impact fee statute as drafted*

A land-use statute is constitutionally valid as drafted when it meets four federal constitutional criteria. The statute cannot violate either the Fourteenth Amendment's Equal Protection or Due Process clauses. Additionally, the statute cannot violate the Fifth Amendment's Takings Clause. Finally, the statute cannot violate article I section (8) of the Constitution by administratively imposing a tax in the guise of a fee.

Of the four criteria, the equal protection question is most important to foreign nationals. The remaining three constitutional questions apply to all developers, and are, therefore, not unique to foreign nationals. However, the equal protection question is unique to foreign nationals because determining impact fees based primarily on national origin impermissibly discriminates against foreign developers and thereby probably violates the foreign developer's equal protection rights.

An equal protection claim against Hawaii's impact fee statute is likely to succeed in federal court if the foreign developer claims that the statute discriminates between developers on the basis of race or national

origin.<sup>119</sup> A substantiated racial discrimination claim will cause a court to review Hawaii's statute under the strict scrutiny review standard.<sup>120</sup> To trigger strict scrutiny review, the developer must show that the statute is discriminatory in nature by showing that the statute furthers a discriminatory intent.<sup>121</sup>

If the statute's language furthers a discriminatory legislative intent, then the statute violates the Fourteenth Amendment's Equal Protection Clause.<sup>122</sup> A court finds a discriminatory intent either from the statute's text or constructively from considering the following factors: (1) when there is a series of official actions taken for invidious purposes; (2) when there is a departure from the normal procedural sequence; (3) when factors usually considered important by the decision maker strongly favor a contrary decision; or (4) when there are contemporaneous statements by members of the decision making body.<sup>123</sup> A foreign national may also succeed in showing a constructive discriminatory intent because the statute permits local governments to assess higher impact fees to foreign developers who cannot demonstrate they will continue to support local infrastructure through development fees and other payments over the next twenty years.<sup>124</sup> However, it is questionable whether such a showing would amount to demonstrating a discriminatory legislative intent.

To counter the foreign developer's assertion, the state, in accordance with *City of Cleburne v. Cleburne Living Center*,<sup>125</sup> may justify the statute's distinction between developers by arguing that charging one time develop-

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<sup>119</sup> MANDELKER, *supra* note 64, at 287.

<sup>120</sup> *Id.*

<sup>121</sup> See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

<sup>122</sup> *Id.* (holding that proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause).

<sup>123</sup> *Id.* at 264-69.

<sup>124</sup> See HAW. REV. STAT. § 46-143(d)(5)-(6) (1993):

(5) The extent to which a developer required to pay impact fees has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit therefrom, and any credits that may be due to a development because of such contributions;

(6) The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments . . .

<sup>125</sup> 473 U.S. 432 (1985) (stating that all persons similarly situated should be treated alike unless the distinguishing classification drawn by a statute is rationally related to a legitimate state interest).

ers higher rates is in the state's legitimate interest because such a distinction is fundamentally fair. The state could potentially justify the statute's language, which permits charging foreign developers higher impact fees by claiming any distinction made by the statute's language between local developers and foreign developers is merely secondary to the state's legitimate interests in distinguishing between multi-project developers and one-time developers. The rationale is that multi-project developers, unlike one-time developers, generally pay future special assessments, debt service payments, and other payments in addition to impact fees.<sup>126</sup> By charging the same impact fee rate to both one time developers and developers of many projects, the local government, in effect, would be subjecting multi-project developers to double taxation.<sup>127</sup> In reviewing the legislative record and the wording of the statute, there are no facts, other than the potential higher assessment rate to one time developers, that indicates a statutory discriminatory intent.<sup>128</sup> Therefore, as the statute is drafted, Hawaii's impact fee statute probably does not violate the Fourteenth Amendment's Equal Protection Clause.

*b. Constitutionality of impact fee statute as applied*

A foreign developer may challenge an individual impact fee assessment under one of three following bases: (1) as an uncompensated regulatory taking of property; (2) as a violation of the municipality's taxing authority; or (3) as an impermissible discriminatory action against foreign developers. However, as noted in the previous section, this section will focus on how a foreign national can challenge a disproportionately high impact fee assessment as violative of his or her Fourteenth Amendment Equal Protection rights. After addressing the burdens and standards of proof, the section discusses, in the context of Hawaii's \$100 million golf course impact fee, the possible arguments that each side could advance to either challenge an impact fee assessment or to support an impact fee assessment.

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<sup>126</sup> See *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981) (stating that by discounting for future contributions to the county's capital improvements the county will avoid "double taxation" of the developer when assessing impact fees).

<sup>127</sup> *Id.*

<sup>128</sup> The U.S. Supreme Court found that corporations doing business within a state are "persons within the jurisdiction" and are protected by the equal protection clause of the Fourteenth Amendment. See, e.g., *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921).

To challenge a specific impact fee assessment, the initial burden of proof falls upon the foreign developer. A foreign developer must show that the assessment was motivated by a discriminatory intent.<sup>129</sup> Showing that an impact fee assessment was motivated by a discriminatory intent triggers strict scrutiny judicial review of the assessment.<sup>130</sup> Once strict scrutiny judicial review is triggered, the burden shifts to the local government to justify its impact fee assessment.<sup>131</sup> Local government meets its burden of proof by showing that the particular assessment furthers a compelling governmental interest.<sup>132</sup> However, to meet their burdens of proof, each side must meet the minimum standard of proof to support their assertions.

To meet the standard of proof, the challenging foreign developer must show that the impact fee assessment was motivated by a discriminatory intent.<sup>133</sup> In considering a foreign developer's claim, a court will consider the developer's claim under the test set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>134</sup> Under this test, a court may consider, as one of several factors, whether such assessments evidence a discriminatory intent by disproportionately impact foreign developers.<sup>135</sup> Additionally, a court may consider the following factors: (1) whether there is a departure from the normal procedural sequence; (2) whether factors usually considered important by the decision maker strongly favor a decision contrary to the one reached; and (3) whether there are contemporary statements by members of the decision-making body evidencing a discriminatory intent.<sup>136</sup> After considering these factors, if the court finds sufficient evidence that the assessment was motivated by a discriminatory intent, then the local government must show why such an assessment is justified.

In evaluating whether disproportionately high impact fee assessments are valid under Hawaii's House Bill 3787, one should also consider Hawaii's political and social pressures. If considered, such pressures could support the foreign national's position by indicating that such assessments were based on factors other than those normally considered by the decision maker.

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<sup>129</sup> MANDELKER, *supra* note 64, at 287.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 290.

<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-5 (1977).

<sup>134</sup> *Id.*; see also MANDELKER, *supra* note 64, at 287.

<sup>135</sup> See also MANDELKER, *supra* note 64, at 287.

<sup>136</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-69 (1977).

Hawaii's \$100 million golf course impact fee provides an example of how these pressure might affect a decision maker. As noted earlier, the \$100 million golf course impact fee was proposed at a time when virtually all the developers applying for golf course development permits were Japanese and when prior to the proposed \$100 million impact fee, the fee ranged around several million dollars.<sup>137</sup> In addition to disproportionately affecting foreign nationals, Hawaii's \$100 million golf course impact fee probably was motivated by local political and social pressures. Thus, if a foreign national developer challenges a future impact fee assessment, which is similar in nature to Hawaii's \$100 million golf course impact fee, then the foreign national should be able to cite to the golf course impact fee to support his or her position that the challenged impact fee assessment is discriminatory.

C. *Evaluating Whether a Foreign National Can Successfully Challenge an Impact Fee Assessment Authorized Under House Bill 3787*

A foreign developer can probably successfully challenge a disproportionately high impact fee assessment as authorized by House Bill 3787 on the grounds that such an assessment violates his or her equal protection rights. Foreign developers should be able to successfully argue that assessing foreign developers disproportionately high impact fee rates impermissibly discriminates against them on the basis of national origin and thereby triggers strict scrutiny review of the impact fee assessment.

The foreign developer can sustain such a claim by meeting his or her burden of proof by showing that an impact fee assessment was based on a discriminatory intent. To show that the assessment was based on a discriminatory intent, the foreign developer can argue that three of the five factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* are met.<sup>138</sup> First, the foreign developer can argue that such assessments disproportionately burden foreign developers because they are unable to equally qualify for reduced assessments. Second, the foreign developer can argue that such assessments depart from the normal procedural sequence because such assessments exceed the amounts generally assessable under the procedures established by section 143(d)'s seven

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<sup>137</sup> See *supra* notes 6-24 and accompanying text.

<sup>138</sup> 429 U.S. 252, 264-65 (1977); see also MANDELKER, *supra* note 64, at 287.

factors.<sup>139</sup> Finally, the foreign developer can demonstrate the statute's discriminatory impact by showing that the statute's provisions for reducing an assessment, which are based on whether a developer has contributed in the last five years or will likely contribute during the next twenty years, effectively precludes a foreign developer from successfully seeking a reduction in impact fee assessments.<sup>140</sup>

The state, however, can counter by justifying that the distinction drawn between local and foreign developers furthers a compelling governmental interest.<sup>141</sup> Under *City of Cleburne v. Cleburne Living Center*, regulations distinguishing between persons similarly situated do not violate the Equal Protection Clause if the state can demonstrate that the distinction is rationally related to a legitimate state interest.<sup>142</sup> The state can argue that assessing one time developers higher impact fees is fundamentally fair because without such a distinction, multi-project developers, unlike one-time developers, pay twice for the same services when they pay future special assessments, debt service payments, or other payments in addition to impact fees.<sup>143</sup> However persuasive this argument might seem, it will likely fail to justify a \$80 million assessment differential between developers as occurred in the case of golf course assessments.<sup>144</sup> As such, if Hawaii makes similar assessments in the future then these assessments will likely be subject to judicial strict scrutiny and held to violate the foreign developers equal protection rights.

In addition to possibly violating a foreign national's equal protection rights, Hawaii's impact fee statute may be susceptible to the other legal challenges listed at the beginning of this section. The probability that an impact fee assessment authorized by House Bill 3787 will violate a foreign developer's equal protection rights will be greatly increased if Hawaii continues to use impact fees to pay for affordable housing and as a means of controlling foreign investment.

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<sup>139</sup> See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977).

<sup>140</sup> See, e.g., HAW. REV. STAT. § 46-143(d) (1993).

<sup>141</sup> MANDELKER, *supra* note 64, at 287.

<sup>142</sup> 473 U.S. 432 (1985) (stating that all persons similarly situated should be treated alike unless the distinguishing classification drawn by a statute is rationally related to a legitimate state interest).

<sup>143</sup> See, e.g., *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981).

<sup>144</sup> See *supra* notes 6-24 and accompanying text.



#### IV. CONCLUSION

Hawaii should not assess foreign developers higher impact fees than their similarly situated local counterparts. The problem is that Hawaii's impact fee statute does not preclude Hawaii's local governments from assessing foreign developers disproportionately high impact fees, just as they did before the statute's enactment. Two factors suggest that local governments are under pressures to make such assessments. First, Hawaii still has a shortage of affordable housing. Second, there is still local resistance to foreign investment and investors. Under these conditions, it is likely Hawaiian governments will assess foreign developers higher impact fees than their local counterparts.

Assessing foreign developers higher impact fees than local developers will deprive Hawaii of investment revenue. Therefore, such assessments are bad policy. Disproportionately high impact fees, like the \$100 million golf course impact fee, dissuade or chill foreign investment by diminishing the investor's potential return. This "chilling effect" on Hawaiian foreign investment will be exacerbated in the future as the number of prospective Chinese investors wishing to invest in Hawaii grows, but who, due to Hawaii's potentially high impact fees, decided to invest elsewhere.

Assessing foreign developers high impact fees is also susceptible to a number of legal challenges. First, assessing foreign developers high impact fees will likely violate a foreign developer's equal protection rights. Realistically, an \$80 million difference in impact fee assessments between developers cannot be justified under a compelling government interest. This is especially true when one considers that such a fee is being assessed to alleviate the financial impact on the community from only one development. Without a compelling government interest, such an assessment violates the developer's equal protection rights. Additionally, an impact fee may be challenged as an uncompensated regulatory taking of property, as a violation of the municipality's taxing authority, or as an impermissible discriminatory action against foreign developers. Disproportionately high impact fee assessments will be susceptible to these other legal challenges.

Emerging trends in the global economy also support the position that Hawaii should not assess foreign developers high impact fees. Any negative effects from Hawaii assessing foreign developers high impact fees will be compounded by international investors' increased access to information, which increases their ability to transfer capital between markets. Thus,

because of these emerging international investment trends, Hawaii could potentially lose foreign investment as a result of assessing foreign developers disproportionately high impact fees.

To conclude, there are three reasons why Hawaii's local governments should not assess foreign developers disproportionately higher impact fees than their local counterparts. First, such assessments are probably unconstitutional. Second, due to the emerging trends in the global economy, such assessments will generally dissuade foreign investment. Finally, due to the nature of Chinese investment, such assessments will probably cause the Chinese, Hawaii's prospective new investors, to invest their capital in other markets.

## Appendix A

DIVISION 5. CRIMES AND CRIMINAL PROCEEDINGS  
TITLE 6. COUNTY ORGANIZATION AND ADMINISTRATION  
SUBTITLE 1. PROVISIONS COMMON TO ALL COUNTIES  
CHAPTER 46. GENERAL PROVISIONS  
[PART VIII.] IMPACT FEES

HRS @ 46-143 (1993)

Impact fee calculation

(a) A county council considering the enactment of impact fees shall first approve a needs assessment study that shall identify the kinds of public facilities for which the fees shall be imposed. The study shall be prepared by an engineer, architect, or other qualified professional and shall identify service standard levels, project public facility capital improvement needs, and differentiate between existing and future needs.

(b) The data sources and methodology upon which needs assessments and impact fees are based shall be set forth in the needs assessment study.

(c) The pro rata amount of each impact fee shall be based upon the development and actual capital cost of public facility expansion, or a reasonable estimate thereof, to be incurred by the county.

(d) An impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred by the county in accommodating the development. The following seven factors shall be considered in determining a proportionate share of public facility capital improvement costs:

(1) The level of public facility capital improvements required to appropriately serve a development, based on a needs assessment study that identifies:

(A) Deficiencies in existing public facilities;

(B) The means, other than impact fees, by which existing deficiencies will be eliminated within a reasonable period of time; and

(C) Additional demands anticipated to be placed on specified public facilities by a development;

(2) The availability of other funding for public facility capital improvements, including, but not limited to, user charges, taxes, bonds, intergovernmental transfers, and special taxation or assessments;

(3) The cost of existing public facility capital improvements;

(4) The methods by which existing public facility capital improvements were financed;

(5) The extent to which a developer required to pay impact fees has contributed in the previous five years to the cost of existing public facility capital improvements and received no reasonable benefit therefrom, and any credits that may be due to a development because of such contributions;

(6) The extent to which a developer required to pay impact fees over the next twenty years may reasonably be anticipated to contribute to the cost of existing public facility capital improvements through user fees, debt service payments, or other payments, and any credits that may accrue to a development because of future payments; and

(7) The extent to which a developer is required to pay impact fees as a condition precedent to the development of non-site related public facility capital improvements, and any offsets payable to a developer because of this provision.

(e) The impact fee ordinance shall contain a provision setting forth the process by which a developer may contest the amount of the impact fee assessed.

